

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JAMES SCHELL,

Defendant-Appellant.

UNPUBLISHED

February 1, 2007

No. 265459

Oakland Circuit Court

LC No. 2005-202420-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree home invasion, MCL 750.110(a)(3), and was sentenced as an habitual offender, fourth offense, MCL 769.12, to 3 to 35 years in prison. He appeals as of right. We affirm.

Defendant argues that trial counsel was ineffective for failing to object to fingerprint evidence. Defendant's fingerprints were found on a jewelry box that had been taken from the home and was recovered along the side of the road near the home. These prints were the key physical evidence linking defendant to the crime. At trial, the court admitted a report prepared by a fingerprint technician although that technician did not testify. Relying on *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005), defendant argues that report was testimonial hearsay and was inadmissible.

Because defendant did not raise the issue of ineffective assistance of counsel in a motion before the trial court, our review of this issue is limited to errors apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.*, p 578 (citations and internal quotation marks omitted). He must show that his counsel's representation "fell below an objective standard of reasonableness" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Additionally, a defendant "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* A defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.* He must demonstrate "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, pp 302-303 (citations and internal quotation marks omitted).

Although we agree that the technician's report was inadmissible hearsay, *People v McDaniel*, 469 Mich 409; 670 NW2d 659 (2003), we also find that defendant has not established that he was prejudiced by counsel's failure to object to the report. The report was cumulative to the testimony of Tracee McIntosh, a forensic scientist working as a latent print examiner. McIntosh explained that standard operating procedure required that a second examiner examine all identifications, and she was the second examiner in the case. She testified that she independently examined the latent prints in the case and compared them to defendant's known prints. She concluded that the four latent prints were made by defendant's right index finger, left thumb, left middle finger, and left little finger. In light of McIntosh's testimony, there is no reasonable probability that the result of the proceeding would have been different but for counsel's failure to object to admission of the report prepared by another technician.

Defendant also argues that counsel was ineffective for allowing defendant to testify. We find that defendant has failed to overcome the presumption that the decision to have him testify was a matter of sound trial strategy under the circumstances. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). It seems apparent that the strategy was to put into the record an explanation for the presence of defendant's fingerprints on the jewelry box.

Defendant states that his counsel failed to investigate, but as he does not develop this argument legally or factually, this Court need not address it. *People v Van Tubbergen*, 249 Mich App 354, 364; 642 NW2d 368 (2002). Likewise defendant requests an evidentiary hearing, but because he has not established the need for a hearing, we decline the request. MCR 7.211(C)(1)(a)(ii).

Finally, defendant argues that he is entitled to credit, pursuant to MCL 769.11b, for time served pending sentencing. The prosecutor argues that defendant was on parole at the time he committed this offense, and is still serving the sentence for which he was on parole. Defendant argues that he was never required to serve any additional time on his prior sentence.

This issue presents a question of statutory interpretation, which this Court reviews de novo. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). This Court has held that "the provisions of MCL 791.238; MSA 28.2308 preclude a parolee from receiving credit for time served while being held on a parole detainer." *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994).¹ Defendant asserts he is deserves credit for time served because he was unable to post bond. Per MCL 791.238, however, it appears that the time in question was served as a parole detainee. "A parole detainee convicted of a new offense is entitled to have jail credit

¹ MCL 791.238(2): "A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment."

applied exclusively to the sentence from which parole was granted.” *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006)

Defendant also refers to Department of Corrections Policy Directive 06.06.100(D), which states, “A parolee shall receive credit on the sentence(s) for which s/he is being supervised for any period of time s/he is held in custody while on parole.” The plain language of this directive is contrary to defendant’s argument, as it clearly addresses credit with respect to the prior sentence(s).

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper